

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

76-1153

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1153

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S

UNITED STATES OF AMERICA,

Appellee,

v.

CECIL ROBINSON,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR JAMES MELVIN GREEN
AS AMICUS CURIAE

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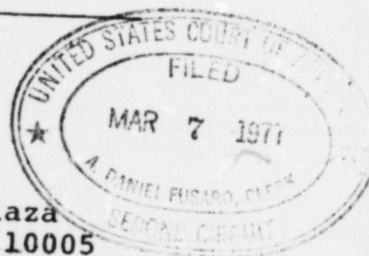


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This brief is submitted on behalf of James Melvin Green as amicus curiae. James Melvin Green is the appellant in an appeal, Docket No. 76-1438, which was argued on January 6, 1977 and is now pending before a panel of this Court (Circuit Judges Mansfield, Gurfein, and Meskill). One of the legal issues involved in Green's appeal is the

same as the issue upon which the Government has sought rehearing in the present case. The Government has acknowledged this fact by arguing in its brief in Green's case (p. 9) that the holding of the majority of the panel in the present case was incorrect and should not be followed.

ISSUE PRESENTED

Green submits that the present case and Green's appeal, while differing to some extent in their underlying facts, both present the following essential issue of law:

In a bank robbery case in which the defendant was arrested days or weeks after the robbery in question, what are the legal standards to be applied by the Court in determining whether it is proper to admit in evidence a gun seized from the defendant at the time of his arrest, when there is no evidence linking that particular weapon to the robbery?

The Government in its Petition for Rehearing appears to contend that such evidence should always (or virtually always) be admissible as a matter of law (see Gov't Pet. 5-6, 14-15).^{*} Green submits, on the contrary,

^{*} Thus. for example, the Government asserts, without any qualification whatever, that "evidence of subsequent possession of a gun, similar to one used in the commission of the underlying offense, is and should be relevant on the question of identity, to be given such weight as a properly instructed jury chooses to afford it." (Gov't Pet. 14-15.)

that the panel in the present case correctly held that, under Rule 403 of the Federal Rules of Evidence, the probative value of the gun as evidence must be weighed against the danger of unfair prejudice to the defendant.

INTEREST OF AMICUS CURIAE

The interest of James Melvin Green as amicus curiae in the present case arises from the fact that in Green's case, as in the present case, evidence concerning a gun seized at the time of his arrest, subsequent to the time of the robberies in question, was admitted against Green, over objection, at his trial. If this Court were to adopt the rule urged by the Government, that such evidence is always admissible as a matter of law, such a rule would control Green's case as well as the present case.

For the reasons set forth below, it is submitted that the Court should not adopt any such rule. In addition, the application of such a rule to Green's case would run counter to four highly relevant factors in Green's case. The specific facts of Green's case, of course, are not presently before this Court en banc. It is submitted, however, that these four factors in Green's case are among those which deserve to be considered by this Court in formulating any rule of general application in the present case:

- (1) In Green's case, there was literally no

evidence that the revolver taken from Green at his arrest even resembled the gun used in any of the robberies charged in the indictment. Not one of the Government's eyewitnesses was asked to identify the revolver taken from Green or to describe the gun used in any of the robberies charged in the indictment.

(2) The revolver, holster, and bullets taken from Green at his arrest not only were described in testimony by the arresting officer, but were physically admitted into evidence and displayed to the jury. Moreover, after retiring for its deliberations, the jury sent out a note specifically requesting the revolver, holster, and bullets (A749-A750*). All of these exhibits (including the three bullets) were sent into the jury room (A750).

(3) The Government specifically argued in its summation that the revolver, holster, and bullets showed that Green was on his way to rob a bank when he was arrested (A684-A685).

(4) The trial court did not give any limiting instruction regarding the purpose for which the revolver, holster, and bullets might be considered against Green. The trial court simply told the jury that it should consider the revolver against Green (A727).

* "A" citations are to the Appendix in Docket No. 76-1438.

ARGUMENT

THE DECISION OF THE PANEL WAS CORRECT

Rule 403 of the Federal Rules of Evidence reads as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The majority of the panel held that, under Rule 403 of the Federal Rules of Evidence, the probative value of a gun offered in evidence must be balanced against the danger of unfair prejudice to the defendant. This holding is clearly correct. Indeed, it follows from the plain terms of Rule 403 of the Federal Rules of Evidence.

The Government, in its Petition for Rehearing, does not explicitly question the holding of the panel majority that Rule 403 of the Federal Rules of Evidence requires a weighing of the probative value of a gun against the danger of unfair prejudice. In fact, except for one glancing and quite irrelevant citation,* the Government's Petition for

* The Government cites Rule 403 only for the proposition that evidence may be excluded, even though relevant, where it would involve needless presentation of cumulative evidence (see Gov't Pet. 11). This proposition, although valid, does not address the provision of Rule 403 which is crucial to the present case, namely, the provision relating to the danger of unfair prejudice.

Rehearing does not even mention Rule 403 of the Federal Rules of Evidence.

Instead, the Government argues that the prior decisions of this Court have established that a gun seized from the defendant is always relevant to the issue of identity, and that any resulting prejudice to the defendant is outweighed by the relevance of such evidence (Gov't Pet. 9-15). This argument grossly overstates the scope of this Court's prior decisions. In fact, the decision of the panel majority in the present case is entirely consistent with the decisions of this Court in prior cases.

In the prior cases in which this Court has held that a gun seized from the defendant was relevant on the issue of identity, there was evidence tending to show that that very gun was used in committing the crime,* or the gun was found in conjunction with narcotics, large amounts of cash, or other particularized and highly incriminating evidence.** Where neither of these factors is present -- as in the present case and in Green's case -- the relevance of the gun to the issue of identity is, as the panel majority

* See, e.g., United States v. Campanile, 516 F.2d 288, 290 (2d Cir. 1975); United States v. Fisher, 455 F.2d 1101, 1103-04 (2d Cir. 1972); United States v. Baker, 419 F.2d 83, 86 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970).

** See, e.g., United States v. Wiener, 534 F.2d 15, 18 (2d Cir. 1976); United States v. Fisher, 455 F.2d 1101, 1103-04 (2d Cir. 1972); United States v. Ravich, 421 F.2d 1196, 1204 (2d Cir.), cert. denied, 400 U.S. 834 (1970).

properly held, attenuated almost to the vanishing point.

This is particularly true where, as in Green's case, there is literally no evidence from which the jury could find that the gun seized from the defendant even resembled the gun used in any of the crimes charged (see pp. 3-4 supra). In such a case, the plain fact is that the possession of the gun has no more relevance on the issue whether the defendant was the perpetrator of the crime than would the possession of any of the millions of other guns, legal and illegal, which are in circulation throughout the United States. In so holding, the panel majority simply gave judicial recognition to a fact which is obvious as a matter of common sense.

Similarly, the panel majority was plainly correct in holding that the introduction into evidence of a gun seized from the defendant carries with it a severe danger of unfair prejudice. Again, there is nothing novel about this holding. For example, in United States v. Campanile, 516 F.2d 288 (2d Cir. 1975), even though the defendant admitted that he had taken the gun in question to Vermont to "line up robberies", 516 F.2d at 290, this Court expressly stated that

"this evidence was on the borderline of admissibility in view of its tendency to create unfair prejudice. [Citation omitted.]" 516 F.2d at 292.

The facts of Green's case, like the facts in the present case, confirm the correctness of the panel's holding that a defendant may suffer great and unfair prejudice from

the admission of a gun into evidence. For example, in Green's case, as noted above (p. 4), the trial court gave no limiting instruction at all. Moreover, in Green's case the Government argued in its summation that the revolver, holster, and bullets helped to show that Green was on his way to rob a bank when he was arrested (see p. 4 supra).^{*} Finally, the jury in Green's case specifically asked for (and received) not only the revolver and holster but also the three bullets (see p. 4 supra). As the Eighth Circuit aptly stated in Walker v. United States, 490 F.2d 683, 685 (8th Cir. 1974), such an inquiry "disclosed at least one juror's preoccupation with weapons as they related to the case"

All of these factors were not only highly prejudicial but wholly unnecessary. For example, there was no need to exhibit the revolver to the jury or to send it into the jury room; there was certainly no need to send the bullets into the jury room with it. It is submitted that the Court should weigh the highly unfair and unnecessary prejudice resulting from such factors in formulating any rule of general application in the present case.

^{*} A similar argument was made by the Government in its summation in Walker v. United States, 490 F.2d 683, 685 n.3 (8th Cir. 1974). As the Government correctly states in its Petition for Rehearing in the present case (Gov't Pet. 12), such a "'bad man' argument from the gun . . . is highly impermissible." (Footnote omitted.) It is also, of course, highly prejudicial.

For the reasons set forth above, Green submits that the holding of the majority of the panel in the present case was correct and was in full accord with the prior decisions of this Court.

CONCLUSION

For the reasons given above, amicus curiae James Melvin Green respectfully submits that the decision of the panel in the present case should be confirmed in all respects.

Dated: New York, New York
March 3, 1977

Respectfully submitted,

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